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In the Supreme Court

of the United States

OCTOBER TERM, 1958

No. 692

CONSOLIDATED FREIGHTWAYS, INC.,
a corporation,

Petitioner,

vs.

UNITED TRUCK LINES, INC.,
a corporation,

Respondent.

PETITIONER'S REPLY BRIEF

DONALD A. SCHAFER,
JAMES P. CRONAN, JR.,
1026 Public Service Bldg.,
Portland 4, Oregon,
Counsel for Petitioner.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE.

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To The Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States.

In its brief opposing the petition for Writ of Certiorari, respondent reviews the earlier federal litigation between the parties based upon a complaint similar to the present one and concludes at p. 2:

> "If there was no substantial federal question in the prior litigation in the Federal Courts, it is difficult to see how there could be a substantial federal question presented by the identical complaint which has now been rejected by the Supreme Court of the State of Oregon."

In the petition we pointed out that the Court of Appeals for the Ninth Circuit affirmed the District Court's dismissal of the complaint for want of jurisdiction for the reason according to the Court that ". . . Absolutely no claim is made of a right to recover based on the statute [the Motor Carrier Act] itself." (Petition, p. 4, 216 F. (2d) at p. 547)

The language of the Court of Appeals which concluded with this quotation is as follows:

> "Although appellant in the case at bar charged appellee with a breach of the Interstate Commerce Act by transporting property for compensation in interstate commerce without obtaining from the Commission a 'certificate' over the route in question, still it does not clearly appear that the complaint was 'drawn so as to claim a right to recover under the Constitution and laws of the United States,' or that appellee's alleged violation of the Motor Carrier Act forms the 'sole basis of the relief sought.' In fact appellant's contentions clearly and bluntly establish that the real basis of its suit is 'unfair competition,' and that appellee's violation of the Interstate Commerce Act had the legal effect of creating a common law right of action in favor of appellant under a theory of liability discussed in Section 710 of the Restatement of Torts dealing with 'Engaging in Business in Violation of Legislative Enactment.'
>
> "In a Memorandum of Authorities provided for the district court, appellant emphasized that the basis for the recovery sought by it was *a violation of the common law*. There it said:
>
> 'The substantive law of this case is bottomed upon the proposition contained in Sec. 710 of the Restatement of Torts (American Law Institute, Vol. 111, 1938):
>
> 'Sec. 710. Engaging in Business in Violation of Legislative Enactment.

'One who engages in a business or profession in violation of a legislative enactment which prohibits persons from engaging therein, either absolutely or without a prescribed permission, is subject to liability to another who is engaged in the business or profession in conformity with the enactment, if, but only if,

(a) one of the purposes of the enactment is to protect the other against unauthorized competition, and

(b) the enactment does not negative such liability.

'A careful study of the Interstate Commerce Act, as amended, including the Motor Carrier Act of 1935, and of the legislative history and administrative and court interpretations of the Act, leaves no doubt that the Act is of the character described in the Restatement proposition.'

"This memorandum then traced the common law development of this theory from a case in 1806, this to establish its right to recover on the basis of 'unfair competition.' Absolutely no claim is made of a right to recover based on the statute itself." (Resp. Br., App., pp. 13-14, emphasis the Court's)

Thus it is clear that the federal complaint was dismissed by the Court of Appeals because it thought plaintiff there relied for liability on a breach of the common law rather than on a breach of the Motor Carrier Act.

As to the present case, we said in the Petition (p. 5) that the Oregon Supreme Court ". . . extensively analyzed the Congressional history of the Federal Motor Carrier Act (Tr. 3; 253-4), distinguished this Court's opinion in *Penna. R.R. Co. v. Sonman Coal Co.*,

242 U.S. 120 (Tr. 3; 256-8) and, though stating that it was '. . . unable to find any discussion of the specific problem of the scope of relief under the Motor Carrier Act . . .' (Tr. 3; 259), nevertheless concluded that Congress intended that the Act be enforced solely by the Interstate Commerce Commission and that, accordingly, private claims for relief were precluded in both federal and state courts (Tr. 3, 262) . . ."

Thus, not only does the Supreme Court of Oregon's opinion make it clear that that Court held petitioner was relying on the Federal Motor Carrier Act, the Court has executed its Certificate of Existence of Federal Question to that effect (Tr. 9).

Conclusion

For the reasons stated in the Petition, the writ should issue.

Respectfully submitted,

DONALD A. SCHAFER,
JAMES P. CRONAN, JR.,
1026 Public Service Bldg.,
Portland 4, Oregon,
Counsel for Petitioner.

March 4, 1959.